

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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ANTHONY A. DE VIVO,

Petitioner,

v.

9:02-CV-0840  
(LEK)(DEP)

SUPERINTENDENT, Auburn Correctional Facility,

Respondent.

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APPEARANCES:

OF COUNSEL:

ANTHONY A. DE VIVO  
Petitioner, *pro se*

HON. ELIOT SPITZER  
New York State Attorney General  
Attorney for Respondent

PATRICK F. MACRAE, Esq.  
ED J. THOMPSON, Esq.  
Assistant Attorneys General

LAWRENCE E. KAHN, United States District Judge

**ORDER**

Petitioner Anthony A. DeVivo filed a petition for a writ of habeas corpus with the Court on June 26, 2002. Dkt. No. 1. Petitioner filed an amended petition on September 9, 2002. Dkt. No. 7. The amended petition was recommended denied and dismissed by the Report and Recommendation of United States Magistrate Judge David E. Peebles filed on October 19, 2005. Dkt. No. 31. That Report and Recommendation was adopted, and the amended petition dismissed, by Order of this Court filed on March 8, 2006. Dkt. No. 34. Judgment was entered in favor of respondent on March 8, 2006. Dkt. No. 35. Petitioner filed a Notice of Appeal. Dkt. No. 37. Presently before the Court is a motion for a Certificate of Appealability ("COA") filed by petitioner. Dkt. No. 38. Respondent opposes petitioner's request for a COA. Dkt. No. 39.

Section 2253(c)(1) of Title 28 of the United States Code provides, in pertinent part, that

[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

- (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
- (B) the final order in a proceeding under section 2255.

28 U.S.C. § 2253(c)(1).<sup>1</sup>

Furthermore, the Court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

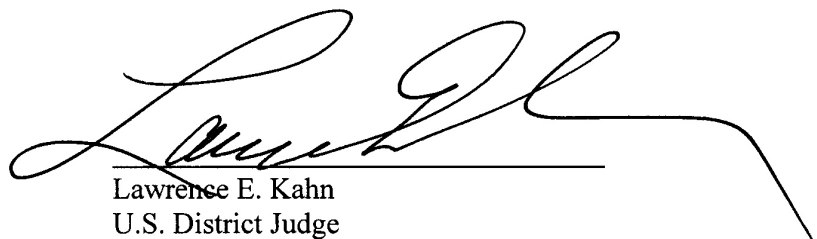
After reviewing the relevant portions of the file, and for the reasons set forth in Magistrate Judge Peeble’s Report-Recommendation and this Court’s March 8, 2006 Order, the Court finds that the petitioner has failed to make the required showing. Therefore, the Court denies his request.

**WHEREFORE**, it is hereby

**ORDERED**, that petitioner’s motion for a Certificate of Appealability (Dkt. No. 38) is **DENIED**, and it is further

**ORDERED**, that the Clerk of the Court serve a copy of this Order upon the parties.

Dated: April 24, 2006  
Albany, New York

  
Lawrence E. Kahn  
U.S. District Judge

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<sup>1</sup> Likewise, Rule 22 of the Federal Rules of Appellate Procedure provides, in pertinent part, that “[i]n a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).” Fed. R. App. P. 22(b)(1).